

Independent Contractor Study Committee
Minutes: June 3, 2004

Attendance: Riley Johnson, James Nys, Spook Stang (substituting for Brian Smith), Nancy Butler, Larry Jones, Dave Cogley, Cary Hegreberg, Margaret Ore (for Webb Brown), Jacqueline Lenmark, Carl Schweitzer, Jerry Driscoll, Larry Mayo, Jason Miller, Bob Worthington, Jerry Keck and Byron Roberts

Public in Attendance: Pat Murdo

Facilitator: John Andrew

Minutes: Keith Messmer

Jerry Keck reviewed the handout outlining how the Department would implement the Independent Contractor ideas that were presented at the April 13th meeting.

Carl: If someone questions their status as an IC for Human Rights does that open the door for other areas?

Jerry: The IC is conclusive until the Department determines the A test has not been met. Once notice is given, Wage and Hour complaint would open IC investigation.

Kevin Braun: Waiver language drafted by Larry would address workers' compensation concern, should not be eligible.

Jerry D: Why would anyone have employees if the IC exemption is conclusive? If you choose to violate it you can with no consequences. Mechanics lien could be filed.

Kevin: Regardless if contractors are paid, individual is eligible to receive UI benefits.

Jerry D: My advise to them is to file under mechanics lien act. How can you deny Human Rights?

Jerry K: Have to establish employment relationship to be eligible for a Human Rights claim.

Kevin: It is a different kind of legal address.

Jacqueline: Giving advice in areas that the Department doesn't have control over, might be good to be giving notice that this may effect rights, but not good to be giving legal advice. Don't include in affidavit.

Jerry K: I feel like we should be giving notice. The Department does enforce all of these areas. Our concern is if you do this you may be affecting these rights. We routinely dismiss cases if IC.

Kevin: Can't waive rights to these other programs so we didn't include. We do need to look further at WC waiver and make other changes.

Byron: As an advisory Piece, don't need to include in the affidavit.

Riley: Should rephrase 6e. It is confusing "working with employees".

Carl: Why is it not "will be" fined?

Nancy: Fining is just one alternative, may not want to do. Lot of exposure to an employer.

Riley: Rephrase to fines and penalties in 6E.

Jerry K: In evaluating the point system, Dallas feels that 80% of the current IC's could meet the point standard on renewal, 20% might have a problem. We decided against issuing provisional certificates and don't feel we can require the Memorandums of Understanding.

Spook: What if the applicant is computer illiterate?

Maggie: We will need to work on alternatives to allow those with disabilities to work through the system.

Riley: Written tests at Job Service. Someone could read it to them if language was a problem.

Jerry K: There is nothing that prevents the Dept. today from starting this process to lessen the burden upon passage of this legislation.

Riley: That would give us a paper trail to use in the legislative session to support it.

Jerry K: Right, how many denied, approved, appealed etc.

Riley: If legislature does not approve?

Jerry K: If feedback is that we shouldn't require documentation we would go back to the affidavit.

Jacqueline: Rule making will be necessary.

Kevin: Yes, when changing the process we will need new rules.

Carl: You may not be able to initiate this by July 1 then.

Jerry: Dallas is doing this informally now based on those that don't file business taxes.

Dallas: I have 7,350 renewals that I have processed requiring additional documentation.

Jerry K: Very few have been denied.

Riley: How can you be in business and not file taxes?

Jerry D: You don't have to file a tax return if given a 1099.

Riley: Why wouldn't you want to expense items on your return?

Jerry D: May be reasons, if 1099 not sent, not going to claim the income.

Byron: Assumption, don't need statutory changes, but you can't do this without money so you need the legislation.

Jerry K: We would have to look at if there is an fte available that we could use.

Riley: Is there a statutory time frame for turnaround on the applications.

Dallas: No. I process them in 1 to 2 days if the info is there. If not, 30 days generally if I have to get additional information.

Carl: I see a liability insurance policy is 60 points. Does the department have the authority to require a liability policy as a condition of issuing the certificate?

Kevin: There may be authority, we do have broad authority. Only thing that could prevent is going beyond the legislative authority, but probably yes.

Jerry K: Is a \$200 fee high enough to discourage the illegitimate IC's?

Margaret: What is the fee now?

Jerry K: \$17 for 2 years, we reduced it from 3 to 2 years and adjusted the fee to make it revenue neutral.

Bob: You will want to work this backwards to make sure the \$200 is sufficient?

Riley: Am I still a contractor if I have a certificate even if I am operating as an employee?

Jerry K: Yes, the certificate is conclusive until the Department investigates and found you to be an employee.

Riley: Until the department determination, if I get hurt it's my nickel, but upon determining employee status the injury is on the employer. Can financial part of this be recouped?

Jerry: In our analysis \$200 is sufficient.

Riley: Looking at inflationary factor, it is expensive to have auditors, may want \$5,000 for violations because the legislature will reduce the amount.

Carl: If there is a carpet layer, and the auditor comes in what are they going to be looking for?

Jerry: We will develop a worker relationship questionnaire that will be completed by the employer and the IC. If they are in collusion we may not be able to get to the heart of the relationship, but if complaint or relationship is souring, look at others, talk to others to determine the real relationship.

Sharon: There are 2 kinds of audits. One on the employer and one on the IC.

Jerry K: Either way, do the equivalent of the worker relationship questionnaire with the people on the job site.

Riley: Don't need to know if it is an A or B problem but is it clear that the employee relationship is determined and appeal rights are given?

Jerry K: The determination will be made and a cease and desist issued.

Riley: Are appeal rights given?

Kevin: Cease and Desist is not the first step. Upon determination if they don't argue, we are not going to go beyond the determination.

Carl: If you become good at enforcing, employer will be afraid of using IC's and may require coverage.

Jerry K: We are not proposing to shut down projects unless there is fraudulent behavior. We will want to speed the appeal process.

Jerry D: Conclusive if you have the piece of paper, if auditor determines you are not what are you?

Jerry K: We will revoke if part B is not met, and suspend for the job if part A is not met.

Jerry D: What about people who don't get the IC.

Jerry K: Then you have an employee.

Riley: The appeal process is often times confusing. Make it simple, should be a very easy first step of appeal.

Jerry K: Would a law in motion day process be possible?

Carl: What is 14?

Jerry K: If we do an onsite audit because of a complaint and we determine employees because the hiring agent is not following part A, once we give the notice that the IC is not appropriate then continued operation is subject to a fine.

Bob: If the injury occurs before the department issues a determination it is conclusive.

Jerry: That is what we are trying to do.

Riley: Can they sue civilly?

Jerry K: Yes

Bob: The underlying concern "Will the court see it this way?"

Riley: Is a complaint necessary to audit?

Jerry K: No, priority to complaints, doing desk audits now. Increase this process and do some random audits.

Carl: As an auditor, if I see someone, "is that your ladder?" If no, is that enough to determine employee?

Maggie: No, you have to evaluate other factors.

Larry: Look at the totality of the circumstance, probably is enough though based on the kickboard case for example.

Jerry D: If truly an IC don't need the exemption under current law. Under this proposal, the employer gets lawsuit rather than the WC cap. How are you going to control those who don't get the piece of paper? May be legitimate IC's. This whole thing was started way back when to protect homeowners if they fall off of the roof. We are trying to fix something that isn't broken. The thing to do is educate to use A & B or you will be sued. How many cases on IC made it to the SC.

Larry: 7 to 10 have gone to the Supreme Court.

Jerry D: You are not fixing anything and are giving false security. If the auditor comes in, you're an employee, employer will get someone else. Supreme Court will say yes you have violated rights, conclusive will get thrown out.

Carl: Exactly what Jerry is getting at; it is a house of cards, why in Wild case wasn't this addressed?

Kevin: The court usually avoids constitutional issues if they can, we don't know what the court will do.

John: Addressing court statement that the department needs to take a more active role.

Riley: Necessary to have this. If it doesn't work then we need to go to mandatory.

Jerry D: Notify employers they need to abide by A & B.

Jerry K: Department can do the best they can on B. A goes back on IC and hiring agent. Significant penalties if violating.

Jerry D: If I violate for 6 months then the Dept. comes out and I quit what is my fine?

Jerry K: Nothing, but now you are on record.

Maggie: We are building a record, if you continue to do this, steps up liability. Education is the key.

Jerry D: You think if you write a law people are going to follow it?

Riley: My people feel they are hung out there with no protection, need something to hang their hat on.

Jerry D: You do have something if you follow A & B.

Jerry K: WC insurers want protection, employers want certainty. You are talking about those operating outside of the law.

Jerry D: Wild was purposeful.

Nancy: Doig case found IC.

Larry: Davis vs. Solander IC.

Jerry D: You've made my point. You are ok if you follow AB.

Riley: But how much is it going to cost me to defend myself to prove it?

Bob: Is this consistent with what Dallas is seeing.

Jerry K: Not everyone renews. The 18 to 20 year olds go off to do something else and are not renewing.

Carl: Dropping from 30,000 to 20,000 in the construction area primarily. Wondering if I am in a different profession will I be upset by the increase in the fee caused by construction workers.

Jerry D: If you don't get \$200 is nothing going to be done?

Riley: Promise to look at after a year or 2 to see if this is an appropriate amount.

Jacqueline: \$200 for 2-year period, \$200 for renewal.

Jerry K: Right.

Margaret: 30,000 now? This number won't hold.

Jerry K: 8,000 renewals, 7,000 new ones each year.

Riley: What if I get a WC policy and then come back in 6 months, would you have a record?

Jerry D: Why would you pay \$200 for IC if you have a policy?

Jerry K: XYZ Construction Co. says you have to have an IC.

Jerry D: No, IC or policy?

Jerry K: Employer is liable so needs the IC protection.

Byron: A 19-year-old evading WC laws need a system at the front end to stop the abuses. That's why we have 30,000 IC's. It's worth giving a try.

Riley: So if I have a policy still need an IC?

Bob: Only if an employer requires it.

Riley: After a couple of years we will have a lot less than 20,000.

Bob: Maybe that is a good thing, to get to the proper level of IC's. Legitimate ones.

Jerry D: Get all this and get hurt, won't get payments?

Bob: You will under your own policy.

Nancy: Endorse coverage on themselves, get hurt will get protection.

Jerry D: Unless established you are an employee?

Nancy: Once it is sorted out, one policy will cover.

Riley: How far can you go back if uninsured?

Kevin: 3 years.

Bob: How do you define occurrence? If you have 12 employees.

Jerry K: 12 employees, \$1,000 per employee per day.

Bob: Need to define this.

Carl: If ladder isn't an occurrence then what is?

Jerry K: To the point we make the determination forward.

Carl: What happens if I personally revoke it, what happens?

Jerry K: If you no longer have the certification contractor needs coverage if the contractor wants to continue using you.

Riley: You have to have some rebate for those who get denied, can't keep \$200.

Carl: Should have some sting, all but \$50 maybe.

Riley: Legislature won't go for that. You should leave mediation as an alternative. Should have an opportunity to say this is unreasonable.

Bob: Help me with 2, isn't that a contract issue?

Jerry K: It happens with frequency now.

Bob: If you have conclusiveness you won't need this. Watering this down, getting in the middle of something that isn't the department's business.

Riley: Educational piece. You come to the department and the department educates you. I can see the employer questioning this.

Carl: Very subjective thing. Your folks working with people, but the subjectivity causes me problems. What about Wild, what would your auditors have found?

John: One of the things we have talked about is focusing audits on the new certificate holders.

Riley: Best without penalty. Use the audits as an educational component.

Jason: Audit procedure from my experience, people are fairly forthright about the relationship. Ensure people know there is a clearly defined role.

Riley: Employer doesn't have time. The first time he actually will look at it is when it is brought to his attention.

Jerry D: Do I get points only if A& B are met on 3

Dallas: No, if you give one you get point.

Carl: How did you come up with 250?

Dallas: I started out with 75 for provisional, double for legitimate. Then started reviewing actual aps to see how it worked out.

Riley: Good place to start, can be reviewed to see if makes sense as we go.

Jacqueline: What would list total? Seems like you could get there really fast.

Jerry D: If I bring in business taxes and apply for the IC, I have violated the law already by not having the IC.

Jerry K: We are not going to go back and penalize. If they got hurt during that time the employer would be on the hook.

Margaret: Could be coming from out of state.

Riley: Good basis, not going to be perfect.

Jerry K: This is draft legislation, written by non-lawyers.

Riley: What is meant by main street business?

Dallas: They operate out of home or business and don't go to the job site for work.

Larry: MSC made up the part where if you only work for one employer you are an employee.

Jerry K: In reviewing the minutes Spook said this might be problematic for truckers.

Larry: Change opt out to waiver on page 1, section 409. Waiver statute needs to be amended. (Larry's draft has the language to insert in 409.)

Jacqueline: Change negative to "It is the public policy that....." in the second sentence.

Larry: Public policy changes needed to reverse the court case.

Jerry D: What did paying more have to do with public policy?

Larry: Court said offering more was against public policy.

Carl: What public policy was that?

Larry: They made it up.

Kevin: Public policy was mandatory WC coverage provision.

Nancy: May need to rephrase A.

Margaret: Working for homeowner and don't have it does the homeowner then have an employee?

Kevin: No that would be casual labor.

Larry: Strike "valid" on 2.

Kevin: Right, change to current.

Larry: Why not delete 120 A&B altogether and put in new section. There is a problem when arguing 401 and 120.

Carl: Is there a benefit of hiring an IC if a homeowner?

Kevin: No, unless someone trying to argue the casual relationship.

Carl: Then if a homebuilder and only working for owner you wouldn't need the IC.

Kevin: Except if holding yourself out as an IC, then you need to get the exemption.

Larry: In 2 you are creating 2 requirements, delete "fully meeting the requirements and"

Kevin: Eliminate A B test would be the cleanest, but have to have that, the waiver is where the strength of this lies.

Jerry K: If we strike 2, is 4 a problem? 10 is the Colorado statute. On the fee we can add that in upon a denial certain part is refundable.

Riley: If don't meet 30 day requirement, what happens?

Dallas: Nothing, it gets renewed.

Larry: Suspension: Loss of certificate from date forward, clarify 2B so that it is not for the entire job.

Carl: If the department finds 6 months in that it was an employee what does the insurer do?

Larry: Insurer would collect the premium if they choose to. It is a definitional thing to make sure on a go forward basis it is spelled out.

Bob: 2g Violation – What are benefits?

Kevin: Sick leave, vacation pay

Bob: We should further define.

Jerry D: 3A: Limited liability partnership, all 8 partners could opt out, now have to get the IC?

Kevin: If main street business that would override.

Byron: A lot of abuses we see are roofing partnership of 8 people. Do we require documentation now from Secretary of State etc.?

Jerry K: Not now, but would under this.

Byron: But do I get points or do I have to have partnership agreement?

Jerry: We could add that.

Jerry D: Going to keep it that all 8 partners have to have the exemption?

Kevin: Yes to establish would need the exemption, under current statute yes, but court said not having it is not fatal to IC status.

Jerry D: May apply for an "exemption"

Jerry K: The exemption is the IC exemption.

Jerry D: That isn't the way it works now in the real world. Now have to pay \$200 each and subject to big fines if don't do it.

Riley: Exempting me as an S corp., but not partnership. I agree it is not fair.

Kevin: Corporation has employees; LLC's played the game where all were made partners.

Jerry D: Add 20% ownership requirement for partners and then exempt from both requirements.

John: Where are we in getting agreement that this is something that you can accept?

Kevin: Before we do that, opting out of Human Rights, no different then where we are today, just informing them of the potential.

Byron: If accepting non-mandatory, this brings us as far as we can come. On right track as close as we can get to conclusive proof. Caution you have to get rid of abuses. Contractor Association is behind it.

Margaret: Don't want to speak for Webb, but I think we need to do something and move toward conclusive presumption. Never get rid of all abuses.

Larry M: Step in the right direction, not perfect.

Jason: Mandatory is where we want to be, if conclusive we want to ensure enforcement mechanisms are in place.

Jerry D: None of this is going to hold up. If not IC so we will be back here in several years. Ken Toole may have a problem with them giving up their human rights.

Riley: No penalty in tax evasion until caught. Reasonable, in the right direction. Talking to members, have a problem now. Probably the majority of my members would vote for mandatory. This issue will be 2nd position in debate. May get nothing if we go for mandatory. Good logical thing that may get challenged in long run, defensible in the right direction.

Carl: Most of my members think mandatory is the only answer. Where should the risk be born, by the employer or the IC? If this is the only thing we can get through then step in the right direction. Will be challenged. Creating a subsidy for new businesses, someone is going to pay for this. Cost to society, creates an un-level playing field, paying for competitor to compete against them. Roofers, those with coverage paying for those who don't. A lot of times found to be an employee.

Bob: The Cities and Towns have a problem out there. This is a step in the right direction.

Jacqueline: Right thing to do. Right direction to head.

Larry: I agree with Jacqueline.

Nancy: State Fund can support.

Riley: If this doesn't work should move to mandatory coverage. If labor supports this, then I will support labor with mandatory coverage.

Nancy: Is there support for mandatory for construction?

Riley: Not a lot of opposition from members. In the future support it, just think it wouldn't go through.

Jacqueline: Surprised by the discussion. As representative of the insurance industry I am not going to say we need to have mandatory. I have always considered a legislative impossibility because of MBIA and Riley. Maybe should have more discussion about it. Maybe there is a will to do that now.

Riley: Not part of a consensus necessarily. Some members would be violently opposed. I am just leaving the door open. I have always heard NFIB was the roadblock to this happening.

Riley: We shouldn't even bring it up unless the legislature brings it up. Weakens support. Keep it simple or this will be dead.

Bob: Damage our position if we have it in report.

Margaret: Have never addressed mandatory with members.

Jerry D: If crook and want to cheat system, could say you are clerical, but in construction not a problem. If problems don't go away then we will be back. Don't editorialize in public policy, partnership 20% exemption, education requirement want to see emphasis on AB, independence and control, strengthen "valuable equipment" definition to avoid one piece of equipment given by contractor makes you an employee.

Kevin: Not easy to address, do you do a \$ value?

Riley: I am afraid of the court.

Larry: 5 elements, I agree equipment a small thing, but other elements are equally an issue.

Jerry D. A& B test – give education discussing "control". Dwell on that "general contractor" classification on IC exemption.

John: Ongoing discussion continues on education process.

Carl: Not proposing a permanent solution, this is a band-aide. Are you willing to adopt a temporary solution? Need to be upfront about that.

Jerry D: I hope there is another Wild case, where someone violates the AB test.

Jerry K: If you have certainty as we had pre-Wild, it was the model in the US according to Hayes. Do we want to continue on the forefront or do we want to examine on a case-by-case basis.

Riley: Yes my members don't want to do case-by-case. Tell members if you are doing it wrong you will get hurt.

Jacqueline: Legislature does it all the time, band-aides together fixes.

John: Executive summary: So you can see what we are contemplating. Have an introduction, table of contents, commissioner's report, executive summary, and Hayes' report. We will also get the revised draft legislation out as soon as we can.

Jerry D: Is this just going to be cleaned up or a major revision.

Kevin: The intent won't change.

Riley: Can you tighten up without the legislature thinking you are presumptive or will you upset the legislature? Ask for Economic Affairs Committee permission to start earlier?

Kevin: It is easy to justify because of conclusive presumption and court case.

Riley: I agree, but don't jeopardize legislation by doing this on your own. Explain you can't handle 30,000 in a few days; we want to help you address this problem.

Jacqueline: If the department has the authority then it should use it in a vacuum without support of potential legislation. Because of the problem, we have moved forward. Be decisive and move forward.

Riley: I think that would be a mistake. Should be brought up before the committee especially for new legislatures.

Jerry D: I agree, tell them we are going to do it, so at least they will know about it. This is the fourth time this has been fought.

Riley: Don't want to blind-side them.

Jerry K: Ed has been working on the educational piece. Developed a PowerPoint presentation and offered it to schools etc.

Jerry D: Have test and pass with 90% right?

Ed: Yes at least one time need to pass the test.

Kevin: Will have legislation by the end of next week.

Riley: Part of educational component, it is my job and Byron's and others to educate folks, not just the Departments.

Byron: Carey reviewed with board and they gave approval.

John concluded the meeting and thanked everyone for their participation.

